

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 157
3097052

BETWEEN ANTON PEARCE
Applicant

AND ALPINE 182 DEGREES LIMITED
T/A THE SPRINGFIELD HOTEL
Respondent

Member of Authority: Philip Cheyne

Representatives: Kevin Murray and Shayne Boyce, advocates for the Applicant
Blair Wallace, for the Respondent

Investigation Meeting: 28 September and 30 September 2021 at Christchurch

Submissions and further 11 October & 20 October 2021 from the Applicant
Information Received: 14 October 2021 and 25 January 2022 from the Respondent

Date of Determination: 22 April 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Alpine 182 Degrees Limited trades as the Springfield Hotel. Blair Wallace is the sole shareholder and director. Anton Pearce was employed by the company from about March or May 2019. The employment ended in October 2019.

[2] In March 2020, an action was lodged with the Authority. There are several personal grievance claims, seeking reimbursement of lost remuneration and compensation for lost

benefits (plus interest), and compensation for humiliation, loss of dignity and injury to feelings. Claims for remedies for grievances extend to alleged defaults in payment of wages payable under the employment agreement. There are three claims for penalties for breaches of good faith. There are also penalty claims for a breach of s 130(2) of the Employment Relations Act 2000 (time and wage records) and a breach of 134 of the Employment Relations Act 2000 (written employment agreement).

[3] Although late, Alpine 182 lodged a reply. The company says that Mr Pearce abandoned his employment. Other claims are also disputed.

[4] Despite mediation, matters were not resolved.

[5] The statement of problem identified the respondent as Blair Nathan Wallace. By consent, the proceedings were amended to record the company as the correct respondent. I should also note that Alpine 182 did not appear on 28 September 2021 for the investigation meeting. I arranged for the company to be contacted. I then adjourned the investigation meeting to 30 September 2021. Alpine 182 did then participate.

Issues for determination

[6] Mr Pearce's employment ended on or about 14 October 2019. It is common ground that Mr Pearce went on holiday in October, intending to drive to Invercargill. He was involved in a car collision in Christchurch. Mr Pearce sent a txt message to Mr Wallace on 13 October about the crash. Police contacted Mr Wallace. Later, Mr Pearce questioned Mr Wallace about what he had said to Police. There were messages between Mr Pearce and Mr Wallace, including an account by Mr Wallace about what he had said to Police. Mr Wallace tried to call Mr Pearce, without success. The messages stopped. Mr Pearce did not return to work.

[7] Mr Pearce engaged a representative, who sent an email dated 3 January 2020 to Mr Wallace as the company director. The correspondence set out personal grievance claims

and raised other issues regarding the employment. There was no response. The representative sent further correspondence dated 5 February 2020. There was no response. Alpine 182 says it did not receive the 3 January and 5 February communications. The present action was then commenced in the Authority.

[8] The following issues arise:

- (a) Did Mr Pearce raise personal grievance claims within 90 days?
- (b) If so:
 - i. Did Alpine 182 dismiss Mr Pearce?
 - ii. Was Mr Pearce disadvantageously affected by company actions?
- (c) If yes to either issue, was the dismissal/action justified?
- (d) If Mr Pearce has any personal grievance, what remedies should be ordered?
- (e) Is Alpine 182 liable under s 4A of the Employment Relations Act 2000 for a penalty for breach of good faith?
- (f) Is Alpine 182 liable under s 65 of the Employment Relations Act 2000 for a penalty for any failure regarding a written employment agreement?
- (g) Did Alpine 182 breach s 130(2) of the Employment Relations Act 2000 (Time and Wage Records)?
- (h) If Alpine 182 breached the Employment Relations Act 2000, what penalties should apply?
- (i) Are any arrears of wages and holiday pay owed to Mr Pearce?

Did Mr Pearce raise personal grievance claims within 90 days?

[9] A personal grievance is raised with an employer as soon as the employee has made or taken reason steps to make the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.¹

[10] To raise a grievance, no particular form of words or communication method is required. The issue is whether the nature of a complaint is within the statutory definition of a personal grievance and whether the communication conveyed the substance of the complaint to the employer.²

[11] There was an exchange of messages between Mr Pearce and Mr Wallace on 14, 15 and 16 October. The messages evidence a complaint by Mr Pearce that Mr Wallace had told the police that he no longer worked for Alpine 182 and had quit. I find that Mr Pearce conveyed the substance of a complaint about the termination of his employment to Mr Wallace through these messages. The messages raised a personal grievance claim over the termination of the employment.

[12] Mr Pearce instructed Shayne Boyce of Work Law Ltd to represent him. Ms Boyce sent a letter to Mr Wallace. The letter canvassed the dismissal claim as well as other complaints said to amount to personal grievances, now outlined in the statement of problem. I accept the evidence for Mr Pearce that the letter was sent on 3 January 2020 to a valid email address used by Mr Wallace. By this action Mr Pearce took reasonable steps to make his employer aware of grievances set out in the 3 January letter that he wanted the employer to address. I find that the 3 January 2020 email properly raised personal grievance claims set out in the letter, to the extent it set out actions on or after 3 October 2019.

[13] It is necessary to consider Mr Pearce's dismissal personal grievance claim and canvass the disadvantage claims if based on actions on and after 3 October 2019.

¹ Employment Relations Act 2000 s 114(2).

² *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

Did Alpine 182 dismiss Mr Pearce?

[14] This claim is based on what Mr Pearce says the Police were told by Mr Wallace.

[15] Some weeks before the following events, Mr Pearce had told others at the business that he had another job to go to. Mr Pearce's evidence is that he had written out his notice of resignation. His evidence is that it was then verbally agreed between him and Mr Wallace that he would not resign, but would take a holiday before continuing his employment. Mr Pearce's evidence is that this "cancellation" of his resignation was not put in writing. It appears no one retained a copy of the written notice of resignation.

[16] Mrs Wallace (Mr Wallace's mother) told me that she saw Mr Pearce packing up his vehicle. Her evidence is that Mr Pearce was intending to leave the job. That would have left the business without a chef, at a busy time. Mrs Wallace's evidence is that she spoke to Mr Pearce and encouraged him to work over the weekend and to then go and visit his family in Invercargill for a holiday. Mrs Wallace knew the family. I take from Mr Pearce's evidence that the discussion and verbal agreement between him and Mr Wallace followed his exchange with Mrs Wallace.

[17] The business diary entry for Monday 7 October 2019 reads "Anton Away 2 weeks A/L Paid ADVANCE \$2,000". It followed a note on Monday 30 September about Mr Pearce to be paid \$2,000 holiday pay for 2 weeks annual leave "TBA next week".

[18] Mr Pearce messaged Mr Wallace on Tuesday 8 October:

... I'm gonna be away for a bit bro I grabbed more for ya, talk wen I'm back at the hotel. I'm coming straight back too

[19] Given the foregoing exchanges, Mr Pearce left work on the basis that he was on holiday, rather than having resigned. I take from this that Mr Pearce stopped work on or about 7 October.

[20] Mr Pearce messaged Mr Wallace on 13 October at 5.37pm. Mr Pearce said that he had had a car accident and his car had been written off. Early the next morning, he asked Mr Wallace to call him, saying he was “desperate” for money to get another vehicle, as he was stuck. Mr Wallace replied at 2pm saying he would call.

[21] Mr Pearce sent Mr Wallace several messages in the evening on 14 October. Together, they read:

Supp
What dud you tell the cops? That really didn't help
I never went to Invercargill blair. Im in chch
We need to talk
You'd better talk or im going to assume that it is how it looks

[22] Mr Wallace replied “Wtf??” and said he would call shortly. The printed call log shows a failed call, followed by a message from Mr Wallace saying that he had not been able to reach Mr Pearce, who should call or message in reply.

[23] Mr Pearce messaged in reply:

I cant talk right now, the cop told me what you said that I didnt work there anymore, that I quit and went to Invercargill. I also heard that you think all I want is money. I only want what I am due. I earnt 18,000 for 6 months of hatd work, mistly by myself, with non of the equipment that was needed to make it better, mostly 60hr weeks, that's more than 1,200hrs. I that time period. Easy maths. investing my time, my skill, and the rest of the wage you werent giving me for a long time, well it was being invested in your business aswell, being held responsiblefor anything owed to you along the way. And doing so. All the while that same rule didnt apply to you. I only want hat is fair. That figure of \$18,000 is before the 300 a week you charged me. I am asking you in the spirit of fairness it make it right. I do have proof of all this. Itdsup to you to do the tight thing...

[24] Mr Wallace thanked Mr Pearce for the message and said he was happy to talk when Mr Pearce could. Mr Pearce replied very early the next morning inviting Mr Wallace to contact him. He also said:

Im also requesting all wage slips etc, and holiday pay please as im sure you have the notice I gave.

[25] Mr Pearce messaged again that afternoon, asking Mr Wallace what he was going to do and to “sort me out mate”. He said that the phone had been destroyed in the crash but he had the SIM Card.

[26] Mr Wallace called the phone several times, without success. He then messaged Mr Pearce asking if he had an active phone that they could speak on. Mr Pearce replied “What’s to say”. Mr Wallace said he had been trying to call, referred to Mr Pearce’s messages and expressed his concern for Mr Pearce and his state of mind. Mr Pearce replied “Well it’s not your problem”.

[27] Mr Wallace replied:

There is an awful lot it yo say it would seem given the dribble you sent back to me. I’m happy to fix you up. But in order to do so we need to have a conversation, I don’t appreciate the shit you’re sending me, and yeah I am worried about you. You seem to have worked at yourself into a state over what I said to the cops. What the fuck you think I said?? I told me you’re on a weeks holiday and going down to see your daughter. He asked if you were still working there. I said yes I believe so, he mentioned that he may have another job and was going to resign. We can address that when you return from holidays. Whatever you’re getting reading between the lines, could put to bed pretty quickly with a conversation. So grow the fuck up and call me back

[28] It is not necessary to set out any subsequent messages.

[29] Mr Pearce in his 14 October message said that Police stated they had been told by Mr Wallace that Mr Pearce no longer worked for Alpine 182, but had resigned and left for Invercargill. Mr Pearce then asked for his holiday pay based on the notice he had given. Mr Wallace in his response on 15 October disputed having told Police that Mr Pearce no longer worked for the company. He acknowledged having told Police that Mr Pearce may have another job and was going to resign. In evidence, Mr Wallace confirmed the account of his exchange with Police, set out in the 15 October message.

[30] There is no reason to doubt Mr Wallace’s evidence about what he said to Police. It accurately reflects the exchanges between Mr Pearce and the company, before his departure

for a holiday. The diary entry records Mr Pearce leaving for a holiday. There was no reason for Mr Wallace to misrepresent that arrangement in what he told Police. When Mr Pearce raised a concern about what Police claimed to have been told, Mr Wallace promptly explained to Mr Pearce what he had said to Police. In light of Mr Wallace's prompt explanation, Mr Pearce could not have reasonably concluded that his employment had been terminated at Alpine 182's initiative. I find that Mr Pearce was not dismissed by Alpine 182.

[31] Alpine 182 in its reply said that "Anton effectively abandoned his duties". There is a submission for Mr Pearce that Alpine 182 was not entitled to treat him as having abandoned his employment.

[32] However, I find that Mr Pearce's messages amounted to his resignation. He asked for cash, was not available to talk, sought "what i am due", thanked Mr Wallace for "the opportunity", requested wage slips, holiday pay based on "the notice i gave", asked Mr Wallace to "Sort me out mate", and told him "it's not your problem" when Mr Wallace messaged that he had tried to call and was worried about him. The messages communicated Mr Pearce's decision to end the employment.

[33] In summary, Mr Pearce ended the employment by way of his resignation. No personal grievance arises from the termination of Mr Pearce's employment.

Was Mr Pearce disadvantageously affected by company actions?

[34] The definition of personal grievance includes a claim that the employee's employment, or 1 or more conditions of the employment, was affected to the employee's disadvantage by some unjustifiable action by the employer. However, actions that derive

solely from the interpretation, application or operation of any provision of an employment agreement (or the disputed interpretation, application or operation) are excluded.³

[35] Mr Pearce sought to raise various unjustified disadvantage personal grievances by his 3 January 2020 correspondence to Mr Wallace.

[36] Issue is taken about the state of the kitchen facilities when the employment commenced. Mr Pearce says that he was later “required” to renovate the kitchen by himself, in preparation for re-opening in about April 2019.

[37] There is a dispute about when the employment started, but it is not necessary to resolve that point for present purposes. Any action or inaction on Alpine 182’s part which might have disadvantageously affected Mr Pearce’s employment or a condition of his employment, must have occurred or come to his notice by May 2019. Assuming the state of the kitchen facilities and any need for renovation could give rise to a personal grievance, the personal grievance claim had to have been raised with Alpine 182 no later than August 2019, to comply with s 114(1) of the Employment Relations Act 2000. Mr Pearce’s messages in October 2019 and Ms Boyce’s email on 3 January 2020 were too late to validly raise any personal grievance in respect of those issues. Grievance claims arising out of the state of the kitchen facilities initially are not properly before the Authority for investigation and determination.

[38] Mr Pearce lived in during the employment. At paragraph 24 and following, the 3 January 2020 letter set out complaints about the room that was allocated to Mr Pearce. Issues about its state of repair and the lack of services in the room are mentioned. Mr Pearce canvasses these in his evidence. However, I prefer the evidence of Alpine 182 witnesses to the effect that Mr Pearce chose his room when others were available, that it was originally in serviceable condition and that Mr Pearce left the room in a state of disrepair on his departure. On the assumption that Mr Pearce’s complaints might fall within the statutory definition of a

³ Sections 103(1)(b) and 103(3) of the Employment Relations Act 2000.

personal grievance, the matters complained of were not the result of any action or inaction on the part of Alpine 182.

[39] Issues concerning Alpine 182's defaults regarding PAYE tax and KiwiSaver contributions are referred to as personal grievance claims. Mr Pearce's evidence is that he gave Mr Wallace his IRD number at the start of the employment, so expected that PAYE would be deducted and paid to IRD and that the employer KiwiSaver contribution would be paid by Alpine 182 into his KiwiSaver account. Mr Wallace's evidence is that Mr Pearce preferred payment on a cash basis.

[40] Ms Watson is Mr Wallace's partner. Her evidence is that she had a discussion with Mr Pearce about him being on a sickness benefit so wanting to be paid in cash. However, Ms Watson also says that she arrived from Australia on 20 August 2019 and took over as operations manager then. A dairy note on 20 August 2019 "Flight – Virgin – Syd – Mel – CHCH" presumably is a reference to that.

[41] Following the investigation meeting, Mr Pearce lodged confirmation by email from MSD that his benefit was cancelled from the expiry date of his last medical certificate (18 May 2019) and he was re-granted a benefit effective from 28 October 2019. Bank statements for Mr Pearce between July and 7 October 2019 do not show the payment of a benefit. Based on this evidence, Mr Pearce had not been on a benefit for about three months leading up to late August 2019 when Ms Watson became operations manager. Mr Pearce is unlikely to have told Ms Watson he was on a sickness benefit when he was not receiving one. I therefore do not accept Ms Watson's evidence on that point. Mr Wallace's evidence on the matter is hearsay and must be wrong in light of Mr Pearce's documentary evidence.

[42] Whether or not Mr Pearce gave his IRD number to Alpine 182 at or near the start of the employment, there was a statutory obligation on the employer to require that information and to deduct and account for PAYE. Similarly, there was a statutory obligation on the employer in respect of KiwiSaver contributions for qualifying employees.

[43] In light of the employer's continuing statutory obligations regarding PAYE and KiwiSaver, issues about conditions of employment, disadvantage and justification for an employer's actions (or defaults) under s 103(1)(b) and s 103A of the Employment Relations Act 2000 are not material. To the extent a remedy is required for this part of Mr Pearce's employment relationship problem, I treat it as a claim for arrears of money legally payable: see s 160 and s 131 of the Employment Relations Act 2000. I return to assessing arrears below.

[44] Alleged breaches of s 50 and 56 of the Holidays Act 2003 regarding work on public holidays and alternative days and a general claim of failure to pay public holiday entitlements properly under that Act are advanced as unjustified disadvantage personal grievance claims. A 90-day issue arises if any such breach was regarded as giving rise to a personal grievance claim. The last public holiday before the termination of the employment was in June 2019, so complaints in October 2019 and January 2020 would not have complied with s 114(1) of the Employment Relations Act 2000. In any event, I also treat this aspect of the problem as a claim for arrears. These matters are dealt with as arrears and penalties claims.

[45] It is claimed that Alpine 182 "unilaterally changed the agreement" to start charging Mr Pearce \$300 per week for board and lodging. This claim will be considered as part of the arrears claim. Either there was agreement about board and lodging or there was not. If there was, the operation of the agreement could not give rise to a personal grievance claim.⁴ If not, any "deduction" is recoverable as arrears or as an unlawful deduction. I do not deal with it as a personal grievance claim. It is not necessary to consider whether a personal grievance claim was raised in compliance with s 114(1) of the Employment Relations Act 2000.

[46] Alpine 182's alleged breaches of s 4(1A)(b), s 4(1A)(c) and s 4 (1)(b) of the Employment Relations Act 2000 are said to give rise to personal grievances. The alleged breaches of good faith relate to the circumstances of the termination of Mr Pearce's employment. As explained above, Mr Pearce resigned and was not dismissed.

⁴ Employment Relations Act 2000 s 103(3).

[47] In summary, Mr Pearce has not established any personal grievance under s 103(1)(b) of the Employment Relations Act 2000.

[48] As no personal grievances are established, the various claims for compensation and reimbursement cannot succeed.

Is Alpine 182 liable under s 4A of the Employment Relations Act 2000 for a penalty for breach of good faith?

[49] A party to an employment relationship who fails to comply with the statutory good faith duty, is liable to a penalty in the following circumstances: if the failure was deliberate, serious and sustained; or if the failure was intended to undermine bargaining, an employment agreement, an employment relationship or a pay equity claim; or if the failure was a breach of other specified provisions.⁵ The last mentioned head does not apply here. There was no bargaining or pay equity claim and there is no proof of an intention to undermine the employment agreement or the employment relationship between Mr Pearce and the company. I need only deal with the first circumstance to consider whether any proven breach of good faith was deliberate, serious and sustained. Those words establish a high threshold, before a party could be liable for a penalty.

[50] The penalty claim for breach of good faith was advanced on the basis of the personal grievance claims. The claim for a penalty fails for the same reasons the personal grievance claims failed.

Is Alpine 182 liable under s 65 of the Employment Relations Act 2000 for a penalty for any failure regarding a written employment agreement?

[51] In his statement of problem, Mr Pearce describes one of the problems he seeks to be resolved is a penalty to be awarded against Alpine 182 for a failure to have an individual employment agreement pursuant to s 62(4) of the Employment Relations Act 2000. Later in

⁵ Employment Relations Act 2000 s 4A.

the statement, one of the remedies sought is a penalty for breach of s 134 of the Employment Relations Act 2000 for failing to provide an individual employment agreement. The failure to have an individual employment agreement pursuant to s 62(4) of the Act is also characterised as an unjustified disadvantage personal grievance.

[52] To the extent that a failure to comply with the requirements regarding a written employment agreement might give rise to a disadvantage personal grievance,⁶ Mr Pearce did not raise that as a personal grievance claim in his October 2019 messages or the representative's correspondence in January and February 2020. A personal grievance claim founded on the lack of a written employment agreement is not properly before the Authority for determination. However, a penalty claim for that alleged failure is properly before the Authority.

[53] Section 134 of the Employment Relations Act 2000 is referred to as part of this claim. It creates liability for a penalty imposed by the Authority for every person who breaches an employment agreement that they are party to. Persons who are not party to the employment agreement, but who incite, instigate, aid or abet a party's breach, are also liable for a penalty. Section 134 of the Act is not presently relevant.

[54] Section 62 of the Act, referenced by the statement of problem, is also not relevant here. It applies where an employer party to a collective agreement employs a new employee who is not a member of the union that is party to the collective agreement. Alpine 182 was not party to a collective agreement.

[55] Section 63A of the Act applies to bargaining for an individual employment agreement for an employee if no collective agreement covers the work to be done by the employee. Alpine 182 was required to provide to Mr Pearce a copy of the intended agreement, advise him of a right to seek independent advice, give him an opportunity to do so and consider any

⁶ See *O'Boyle v McCue* [2020] NZEmpC 175.

issues raised by him. Failure to comply with the requirements of s 63A renders an employer liable for a penalty, imposed by the Authority.

[56] As s 63A applied, Alpine 182 was required to retain a signed copy of Mr Pearce's employment agreement or an unsigned copy of the intended employment agreement: see s 64(1) and (2) of the Employment Relations Act 2000. An employer who fails to comply with s 64 (1) or s 64(2) is liable to a penalty imposed by the Authority, by effect of s 64(4) of the Employment Relations Act 2000.

[57] The employment agreement had to be in writing. An employer who failed to comply with this requirement is liable to a penalty.

[58] In summary, the statutory obligations on Alpine 182 regarding a written employment agreement were created by s 63A, s 64, and s 65, not by s 62 or s 134 of the Act. Despite the misdescription, Alpine 182 was properly on notice of a penalty claim concerning its obligations regarding a written employment agreement for Mr Pearce.

[59] Mr Pearce's evidence is that there was no written employment agreement offered, but "Blair shook my hand" after terms had been discussed. The absence of a written employment agreement was first asserted in the 3 January 2020 correspondence. The assertion is part of the statement of problem, lodged in March 2020. In evidence now is an unsigned employment agreement, including a schedule that refers to Mr Pearce. Mr Pearce says that he was "very surprised" when Alpine 182 produced this unsigned employment agreement, as he had never seen it beforehand.

[60] In its June 2020 reply, Alpine 182 said "Employment agreement was offered but Anton refused as he was also claiming benefit whilst working here". However, a copy of the "Employment agreement" was not lodged at that stage. It was first lodged as an attachment to an email on 22 September 2020. That followed a direction on 7 September 2020 that the respondent lodge time and wage records and the employment agreement by 21 September 2020.

[61] Its existence in September 2020 is of little assistance in resolving the conflict in the evidence about whether a written employment agreement was provided to Mr Pearce during his employment. It is incomplete and not legislatively compliant. Clause 2.4 refers to terms and conditions described in Schedules A & B. However, Schedule B sets out dispute resolution procedures, not terms and conditions. Clause 5.3 refers to a job description in Schedule C, but Schedule C is not attached. Schedule A refers to an attached “JOB DESCRIPTION”, but it is not attached. Clause 8.6 refers to qualifications listed in Schedule D, but Schedule D is not attached. Clause 7.0 is a trial period provision, expressed to exclude the right to a personal grievance claim if dismissed during the trial period, fixed at the “first 180 calendar days (6 months)”. The law has never permitted a “trial period” longer than 90 days. These irregularities indicate inattention to the requirements for a written agreement whenever the document was compiled, but do not help with whether it was provided to Mr Pearce in 2019.

[62] Ms Watson’s evidence is that she and Mr Wallace presented Mr Pearce with a contract “on several occasions” but Mr Pearce refused to sign it, as he wanted to keep receiving a benefit. However, Ms Watson’s evidence is that she was not part of the initial offer and arrangements with Mr Pearce, but was in charge of payroll after she arrived on 20 August 2019. If Ms Watson had presented a contract to Mr Pearce, that must have happened after her arrival in August. As noted, Mr Pearce’s benefit had ceased about three months earlier. Ms Watson’s evidence is unconvincing.

[63] Mrs Wallace’s evidence is that Mr Pearce was provided with an “employment pack and contract” on 3 separate occasions, but as he was still receiving the sickness benefit, he did not want to sign the agreement. Her evidence is that the final time the pack was presented was “the week prior to Anton abandoning his duties”. This evidence is also unconvincing, in light of the evidence that Mr Pearce’s benefit ceased in May 2019.

[64] Mr Wallace’s evidence is that the “contract” was offered when the hotel re-opened at the start of May 2019, that Mr Pearce was at first hesitant to sign it and then “advised he was

quite happy with the current situation”. Mr Wallace’s evidence is that he found out later through his sister that Mr Pearce was still on the benefit, so did not want to sign the agreement for that reason. As explained, Mr Pearce’s benefit ceased on 18 May 2019, so that could not have operated as his motivation from then.

[65] It is common ground that payments were in cash. The earliest diary entry on Thursday 9 May 2019 records “Anton - \$700 (300 [unreadable])”. I take the “300” as a reference to board and lodging allowance. However, a cash payment of \$700 (assuming it was made) does not match the cash component of the total remuneration package recorded in the employment agreement produced in evidence. Later diary notes do not match the cash component of the package set out in the employment agreement.

[66] Alpine 182 provided an iPhone contract from at least July, met some vehicle costs and provided board and lodging but did not pay wages or salary to match the total remuneration package of \$85,000 specified in Schedule A. Mr Pearce would have benefited significantly by accepting the Schedule A package, compared to what he actually received. One might expect a potential employee, whose benefit entitlement was about to end but offered such an arrangement, would probably agree to it. If offered again later, one might expect an employee in Mr Pearce’s position to accept it. Equally, one might expect that an employer who provides an intended employment agreement to a prospective employee would probably implement the pay provisions of the agreement, even if the agreement remained unsigned.

[67] Overall, the evidence for Alpine 182 that the written employment agreement was offered in about May 2019 and re-offered later during the employment but declined by Mr Pearce is unconvincing. Alpine 182 did not pay Mr Pearce under the agreement. One might have expected the unsigned agreement, if then in existence, would have been provided with the June 2020 statement in reply. However, there is no verifiable evidence that the unsigned employment agreement was in existence any earlier than September 2020. I conclude that Alpine 182 did not provide Mr Pearce with a written employment agreement

during his employment. Alpine 182 is liable for a penalty of up to \$20,000.00 for breaching s 65 of the Employment Relations Act 2000.

Did the company breach s 130(2) of the Employment Relations Act 2000 (Wages and Time Records)?

[68] An employer is required to keep wages and time records in a compliant form: see s 130 of the Employment Relations Act 2000. The employer must immediately provide access to or a copy of the time and wage records, upon request by the employer or a person authorised to represent the employee.⁷ Every employer who fails to comply with these obligations is liable to a penalty imposed by the Authority.⁸ An action to recover a penalty for breach of s 130 of the Employment Relations Act 2000 must be commenced within 12 months of the cause of action.⁹

[69] Mr Pearce's request for "copies of all wage slips etc" on 15 October 2019 by itself and also read in the context of his 14 October message was a request for access to or a copy of his time and wage records. Alpine 182 did not comply with the statutory obligation to provide access to or a copy of the records.

[70] The request for time and wage records was also made by Ms Boyce as Mr Pearce's authorised representative by the letter sent by email on 3 January 2020. A copy of the letter was sent again by track and trace courier to the company's registered office in February 2020. The track and trace delivery report shows it was delivered on 10 February 2020. Alpine 182 did not comply with the statutory obligation to provide access to or a copy of the records.

[71] On 7 September 2020 I directed that Alpine 182 was to lodge and serve the wage and time records by Monday 21 September 2020. The direction was not complied with. On 24 May 2021 Alpine 182 was directed to lodge and serve remaining relevant documents by 17 August 2021. The date was enlarged to 24 August 2021. Alpine 182 did not lodge and serve

⁷ Employment Relations Act 2000 s 130(2).

⁸ Employment Relations Act 2000 s 130(4).

⁹ Employment Relations Act 2000 s 135(5).

any wages and time records. Mr Wallace appeared on 30 September 2021 without wages and time records. Giving evidence, Mr Wallace said he had records of payments to Mr Pearce. He was directed to lodge those records by 7 October 2021. Copies of pages from a diary were lodged on 14 October 2021. Later, Mr Wallace was directed to lodge the original diary. It was lodged on 25 January 2022.

[72] Mr Wallace told me that the diary notes were the only wages and time records. Ms Watson's evidence is that she asked Mr Pearce to fill out time sheets, but he refused. Ms Watson also explains that it was difficult to generate a payslip for Mr Pearce as "a cash employee". The diary notes show amounts and dates of cash payments to Mr Pearce. They do not comply with the statutory obligation to keep compliant wages and time records. The claimed refusal by Mr Pearce to fill out time sheets is not a satisfactory answer to the statutory obligation that an employer must at all times keep a compliant wages and time record.

[73] However, the present claim is for a penalty for the failure to comply with the obligation under s 130(2) to produce records on request. I find that Alpine 182 breached s 130(2) of the Employment Relations Act 2000 and is liable to a penalty of up to \$20,000.00.

What penalties should apply?

[74] Alpine 182 breached s 65 and s 130(2) of the Employment Relations Act 2000, rendering the company liable to penalties of \$40,000.00. I am required to have regard to all relevant matters, including those specified at s 133A of the Act.

[75] The requirements to have a written employment agreement and to produce on request wages and time records relate to employment standards. The effective enforcement of employment standards is a specific object of the Act.¹⁰ Alpine 182 completely failed to comply with its obligations regarding wages and time records and the provision of a written employment agreement. These breaches were intentional. That is apparent from Alpine 182's attempts in evidence to attribute responsibility for the defaults to Mr Pearce. The

¹⁰ Employment Relations Act 2000 s3(a)(ab).

defaults have affected Mr Pearce's ability to establish arrears and my ability to accurately determine the claim. Alpine 182 has avoided the administration necessary to comply with these obligations. It probably has enjoyed some financial advantage compared to labour costs based on proper compliance with these obligations. Alpine 182 has not mitigated the effects of its breaches.

[76] Mr Pearce could not be classified as a vulnerable employee. He was able to leave and secure other employment. Mr Pearce faced no language or other barrier to the enforcement of his rights. I see no reason to distinguish between the approach required for each breach. The penalty should recognise the need to deter others and Alpine 182 from intentional non-compliance with employment standards. These factors lead me to assess each breach at 25% of the maximum, a total of \$10,000.00.

[77] Alpine 182 has not previously been found to have engaged in similar conduct in any proceedings or otherwise. I allow a 50% reduction to account for this, so a total of \$5,000.00, or \$2,500 for each breach.

[78] I mention another factor. There was a family connection between Mr Wallace (and others) and Mr Pearce through a former relationship. It led to the job offer and probably meant issue was not taken with some aspects of Mr Pearce's conduct during the employment. However, the family connection does not justify non-compliance with employment standards.

[79] None of the penalty claims set out in the statement of problem included a request that any part of the penalty be paid to Mr Pearce. That application was first made in submissions for the applicant. However, I accept that Mr Pearce has been affected by Alpine 182's non-compliance in a way that has not otherwise been remedied. I fix 25% as the proportion payable to Mr Pearce, while the remainder will be payable to the Crown.

Are any arrears of wages and holiday pay owed to Mr Pearce?

[80] Mr Pearce says that it was agreed that he would be paid \$27.00 per hour as head chef to run the kitchen. He says he arrived in Springfield on 21 March 2019 and started work that evening. Mr Pearce says that he worked 40-hour weeks for the first period. In later April, the hotel reopened for Friday to Sunday lunches, along with Monday to Sunday breakfasts and dinner. Mr Pearce says he then worked a minimum of 65 hours per week, including 15.5 hours each day Friday, Saturday and Sunday. Mr Pearce says no one helped in the kitchen so he was expected to do it all himself. Mr Pearce's evidence is that he was told not to bother with time sheets. He also says he wrote down his hours in a notebook until about June or July 2019, but stopped doing that and later discarded the notebook.

[81] Mr Wallace's evidence is that there was "no job offer" initially, that Mr Pearce "wasn't paid" but was "housed and feed and received a small cash allowance for cigarettes" and allowed access to the company vehicle. He says that there was a job offer when the hotel reopened at the start of May 2019. However, given Mr Pearce's evidence and Mrs Wallace's evidence set out below, I find that the employment started on Thursday 21 March 2019. Even based on Mr Wallace's evidence, Mr Pearce was performing work for hire or reward from when he first arrived.

[82] I am not satisfied that there was specific discussion or agreement about an hourly rate. I am left to fix the net cash amount payable to Mr Pearce as shown in the diary as the agreed weekly net rate of wages.

[83] Mrs Wallace's evidence is that the previous owners were supposed to stay for two weeks but departed for Australia on Saturday 23 March 2019, leaving Mr Pearce and one other person "to cope". The evidence supports Mr Pearce's evidence that he started working on or about 21 March 2019. Mrs Wallace's evidence is that she worked as a kitchen-hand from mid-April and a second kitchen-hand from May 2019. Statements were provided in the names of two other people, to the effect that they were employed as kitchen-hands from June and July 2019. Putting aside the difference in dates, there is no reason to doubt

Mrs Wallace's evidence, so I do not accept Mr Pearce's evidence that no one helped in the kitchen and he was expected to do it all himself.

[84] Mrs Wallace's evidence is that the hotel was not open for breakfast and a cooked breakfast was not provided. A continental breakfast room was set up by "the team" after evening service, so Mr Pearce "occasionally" had to do the set-up. Again, there is no reason to doubt this evidence.

[85] The evidence about kitchen-hands and breakfast arrangements causes me to doubt Mr Pearce's evidence about the hours that he worked each week. That doubt is reinforced by Mr Pearce discarding his notebook. I also accept Mrs Wallace's evidence that Mr Pearce often needed to be woken when he was due on shift, always took breaks in his room after lunch service, would take breaks upstairs in his room when there were no orders and would leave others to clean up after last orders when she worked there. This evidence adds to the doubt about Mr Pearce's evidence of his working hours.

[86] Although Alpine 182 failed to keep a wages and time record and the failure will have prejudiced Mr Pearce's ability to bring an accurate claim for arrears, I am satisfied as explained above that Alpine 182 has proven that Mr Pearce did not work 65 hours per week. However, I am also satisfied that there was some default in payment to Mr Pearce.

[87] Mr Pearce's evidence is he received no money for a month, \$200 a week in cash for a month, then \$300 a week for a month, then \$500 a week for a month, \$700 for a month and the final month was \$1000 per week.

[88] It is common ground that when Alpine 182 started paying Mr Pearce, he was paid cash by the week. However, Alpine 182 disputes Mr Pearce's figures and refers to amounts written in the diary. The first entry in the diary states \$700.00 (net) was paid on Thursday 9 May, \$800.00 (net) from Thursday 16 May, \$900.00 (net) from Friday 23 August and \$1,000.00 (net) from Friday 27 September 2019. The diary appears to be a contemporaneous note. With one exception, I treat it as recording the amounts actually paid to Mr Pearce. In

his summary of payments to Mr Pearce, Mr Wallace says that 16 weeks were paid at \$800.00. He does not claim only \$700.00 was paid on 9 May. I treat the agreed rate payable to Mr Pearce from the commencement of the employment was \$800.00 (net).

[89] Mr Pearce's evidence of being paid lower amounts is explained, at least partly, by deductions from his cash wages for goods and services used by him but paid for by Alpine 182. I deal with the point below.

[90] I take the rate of \$800 (net) paid initially as the rate to be applied for arrears from Thursday 21 March 2019 to Wednesday 2 May,¹¹ a period of 6 weeks. Alpine 182 cannot show it paid Mr Pearce any wages for that time, so there will be an order for \$4,800.00 (net) to cover that default.

[91] Mr Pearce was paid on Friday 4 October 2019. I treat that as payment for work to Thursday 3 October. I accept Mr Pearce would have worked on Fridays, Saturday and Sunday. When he left on or about Monday 7 October, he was paid \$2,000.00 in cash. A further \$2,000.00 was paid into Mr Pearce's bank account on 18 October, in response to Mr Pearce's messages asking to be paid what he was due. Overall, Mr Pearce was paid more than three weeks at his net weekly rate after he last worked for Alpine 182.

[92] An employer must pay an employee holiday pay calculated at 8% of gross earnings from the commencement of employment, if the employment ends before an entitlement to annual holidays arises.¹² The cash payment of \$2,000.00 was expressly made as holiday pay in advance before the employment ended, but that is taken into account when reconciling holiday pay under s 23 of the Act. Overall, the payment to Mr Pearce of the equivalent of more than three weeks' of his net wages exceeds 8% of his gross earnings from March 2019. In these circumstances, Mr Pearce cannot establish any arrears of holiday pay due under s 23 of the Act.

¹¹ I treat the payment on Thursday 9 May 2019 as wages for the week starting Thursday 2 May 2019.

¹² Holidays Act 2003 s 23.

[93] There is a claim for arrears based on Mr Pearce working on public holidays. The public holidays that fell during the employment were: 19 April (Good Friday), 22 April (Easter Monday), Thursday 25 April (ANZAC Day) and Monday 3 June (Queen's Birthday). There is no credible evidence that Mr Pearce actually worked on any of these days. The first three days all fell before the hotel re-opened. If they were days that would otherwise be working days for Mr Pearce, he has received an ordinary days pay as part of the arrears of weekly wages, as above. Monday 3 June, if an otherwise working day, was covered by the weekly wage paid to Mr Pearce. Alpine 182 complied with its public holidays obligations to Mr Pearce.

[94] At the date of the employment, Mr Pearce either was enrolled as a KiwiSaver member, or Alpine 182 had an obligation to automatically enrol Mr Pearce in KiwiSaver. Alpine 182 would then have had an obligation to pay its employer's contribution at 3% based on Mr Pearce's gross earnings. I am left to estimate the KiwiSaver arrears due to Mr Pearce, as Alpine 182 paid him a net cash amount without calculating or recording gross amounts. The value of board and lodging is not included when calculating an employer's KiwiSaver contribution.¹³ For present purposes I accept Mr Wallace's summary that Mr Pearce was paid \$22,700.00 (net). I add to that the proven arrears of \$4,800.00 (net) to make a total of \$27,500 (net). Tax tables for the time show income between \$14,001 and \$48,000 as subject to PAYE tax at the rate of 18.89% for primary employment.¹⁴ Gross for a net payment of \$27,500 would be \$33,904. The employer's KiwiSaver contribution on that gross would be \$1,017. I round that amount to \$1,000.00 to be paid to Mr Pearce. I fix that amount as a reasonable estimate of the KiwiSaver payment default arising as a result of Alpine 182's failure to comply with its obligations to Mr Pearce under the employment agreement.

¹³ See www.ird.govt.nz.

¹⁴ See www.ird.govt.nz.

Were there deductions from wages payable to Mr Pearce, in breach of the Wages Protection Act 1983.

[95] This matter arose in submissions after Mr Wallace produced his diary showing payments made to Mr Pearce during the employment. I include it as part of this determination. Alpine 182 had plenty of opportunity to provide evidence in support of its position so has not been materially disadvantaged by the point not being raised directly by the statement of problem.

[96] The statute is clear – subject to the provisions of the Act,¹⁵ an employer shall pay the entire wages to a worker without deduction. There are two circumstances where an employer is permitted to deduct amounts from the wages otherwise payable to the worker. One is section 6 but it is not relevant here. The second circumstance is where deductions are made with the worker's written consent or on the worker's written request (section 5).

[97] The diary records many deductions from the wages payable to Mr Pearce. However, there is no evidence of Mr Pearce's written consent or written request for the deductions. There is no documentary evidence to prove any of the amounts that Alpine 182 deducted when it paid Mr Pearce in cash. Absent proof, none of these amounts can be allowed by way of set-off against Mr Pearce's claims. However, I do treat the amounts noted as payment of wages in advance as part of payment of wages made to Mr Pearce.

[98] There were deductions of \$180.00 on 28 May, 14 June and 21 June (totals \$540.00). Another deduction of \$110.00 was made on 12 July. There were deductions of \$200.00 on 13 September, 20 September and 27 September 2019 (totals \$600.00). These were all unlawful under the Wages Protection Act 1993 and Mr Pearce is entitled to recover \$1,250.00.

¹⁵ Wages Protection Act 1983.

Other matters

[99] Alpine 182 raised Mr Pearce not returning a phone he received as part of his employment, saying it was valued at \$800.00. Its return was requested “as per the contract”. Several problems emerge. If the non-return was treated as a breach of the employment agreement by Mr Pearce, Alpine 182 would owe Mr Pearce much more in arrears given the salary specified in the employment agreement. However, I do not accept that the unsigned written agreement applied. Alpine 182 offered no evidence to prove the market value of the phone, to support its claimed lost in any event.

[100] Mr Pearce raised an issue about the deduction of \$300 from wages on account of board and lodging. It will be apparent from the foregoing that I view the employment arrangement as including board and lodging together with a wage. No further reconciliation is required.

Summary and orders

[101] Mr Pearce’s personal grievance claims are dismissed.

[102] Alpine 182 Degrees Limited is to pay Anton Pearce arrears of wages and holiday pay and other money payable of \$5,800.00 (net), pursuant to s 131 of the Employment Relations Act 2000.

[103] Alpine 182 Degrees Limited is to pay Anton Pearce \$1,250.00, pursuant to s 11 of the Wages Protection Act 1983.

[104] Interest was sought. Mr Pearce has been denied the use of this money and is entitled to interest. I fix 15 October 2019 as the starting point for interest as that was approximately when the employment ended and the date of the determination as the end point. Alpine 182 Degrees Limited is to pay Anton Pearce interest of approximately \$325.00 pursuant to clause 11 of Schedule 2 to the Employment Relations Act 2000.

[105] Regarding the KiwiSaver default, Alpine 182 Degrees Limited is to pay Anton Pearce arrears of other money payable of \$1,000.00 (net), pursuant to s 131 of the Employment Relations Act 2000.

[106] Alpine 182 Degrees Limited is to pay penalties for the breaches of s 65 and s 130(2) of the Employment Relations Act 2000 as follows:

- (a) \$3,750.00 payable to the Crown; and
- (b) \$1,250.00 payable to Anton Pearce.

[107] There are no grounds to defer the effect of these orders, so the foregoing amounts are payable immediately.

[108] Costs are reserved. A claim for costs can be made by the party lodging and serving submissions setting out the grounds and amount claimed, within 14 days. The other party may lodge and serve a submission in reply, within a further 14 days. I will then determine costs.

Philip Cheyne
Member of the Employment Relations Authority